

UPPER TRIBUNAL (LANDS CHAMBER)



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UTLC Case Numbers: LRX/18/2016 and LRX/45/2016

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – service charges – responsibility of first-tier tribunal to determine amount payable – need for transparency and clarity – s27A Landlord and Tenant Act 1985 – appeals allowed

IN THE MATTER OF TWO APPEALS AGAINST DECISIONS
OF THE FIRST-TIER TRIBUNAL (PROPERTY CHAMBER)

BETWEEN:

MR WITALIJ JAROWICKI

LRX/18/2016

Appellant

and

FREEHOLD MANAGERS (NOMINEES) LIMITED

Respondent

Re: Flat 3, 38 Spring Road,
Birmingham B11 3FQ

AND BY

MS SVETLANA PROKHOROVA

LRX/45/2016

Appellant

Re: Flat 402, Ashmore House North,
41 Violet Road,
London E3 3QQ

Determination on written representations

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No cases are referred to in this decision

Introduction

1. Section 27A of the Landlord and Tenant Act 1985 provides that:

“(1) An application may be made to the appropriate tribunal for a determination whether a service charge is payable and, if it is, as to –

- (a) the person by whom it is payable,
- (b) the person to whom it is payable,
- (c) the amount which is payable,
- (d) the date at or by which it is payable, and
- (e) the manner in which it is payable.”

2. In England the appropriate tribunal is the First-tier Tribunal (Property Chamber) (“FTT”); in Wales it is the leasehold valuation tribunal. It is rare for these tribunals to be asked to determine by or to whom or when or how a service charge is payable, but the issue of the amount which is payable as a service charge is no doubt the commonest of all the issues which they are called upon to determine in any of their varied jurisdictions.

3. Each of these short appeals concerns a decision of the FTT under section 27A in a dispute over the amount of the service charge payable by the tenant of a leasehold flat. Although there is no other connection between the appeals we have determined them together because they share one striking feature, that is that in neither case did the decision of the FTT determine the fundamental question raised by the application, namely what amount was payable by the tenant to the landlord as a service charge. As a result there remained uncertainty at the conclusion of the proceedings over the entitlements and obligations of the parties and these appeals have been the result.

Ms Prokhorova’s appeal

4. Ms Svetlana Prokhorova is the long leaseholder of flat 402 in a block of 44 flats in Tower Hamlets known as Ashmore House North. Her landlord is Old Ford Housing Association. Ms Prokhorova appeals with the permission of this Tribunal against a decision of the FT given on 26 November 2015. Although given notice of the appeal the Housing Association has chosen not to respond to it, and the appeal has therefore proceeded unopposed and by way of written representations.

5. The proceedings before the FTT were an application under section 27A made jointly by the leaseholders of five of the flats in Ashmore House North, each of whom was liable to contribute to the costs incurred by the Housing Association in connection with the provision of services including the repair, maintenance and insurance of the block, its associated car park and surrounding landscaped areas. The application concerned the service charges payable in each of the years from 2011-12 to 2014-15. Ms Prokhorova represented the other

four applicants at the hearing before the FTT on 7 and 8 September 2015, but none of the other applicants has joined her as a party to the appeal.

6. The FTT identified in paragraph 1 of its decision that the applicants sought a determination of the amount of the service charges payable in each of four relevant years. It then proceeded to address eleven separate heads of expenditure ranging from car park maintenance charges to the cost of cleaning which the leaseholders had challenged. In most cases the issue between the parties turned on the proper interpretation of the lease and on the extent to which the leaseholders had access to certain areas of the estate with a corresponding obligation to contribute towards its maintenance. In relation to insurance the question was whether a cost had been incurred at all, and other questions related to the reasonable amount of the leaseholders' contributions towards the reserve fund and the standard of the cleaning. The FTT's decision on each of the issues was carefully explained and when this Tribunal was asked to grant permission to appeal it found that there was no realistic prospect of a successful appeal on any of the matters which had been decided.

7. When it summarised its conclusions the FTT explained that it had determined the disputed issues "in principle", meaning that it had determined each of the issues on which the liability to pay a service charge turned. What it did not do (and it appears was unable to do on the evidence provided) was to determine the amount which was payable in respect of each year, and in respect of each disputed head of expenditure. Instead, at paragraph (2) of the decision the FTT passed those questions back to the Housing Association, saying this:

"The tribunal has decided the issues in principle and the respondent is required to determine the consequent figures as the respondent did not have the relevant figures available during the hearing."

8. The first ground of Ms Prokhorova's application for permission to appeal, and the only ground on which she was granted permission, was that the applicants had requested a determination of the amount which was payable by them but the FTT had not provided one. As Ms Prokhorova put it in her application "the tribunal's decision made "in principle" does not determine the amounts, leaving the applicants in the same uncertainty about service charges". She considered that she and her fellow leaseholders were entitled to reimbursement of sums overpaid by them in the years in question, but the quantification of those amounts had been left by the tribunal to the Housing Association.

9. If an application is made to the FTT under section 27A of the 1985 Act for a determination of the amount of a service charge payable it is incumbent upon the tribunal to determine that application in accordance with its statutory jurisdiction. Until it has quantified the service charge payable the FTT has not yet fully determined the application. It cannot properly delegate its duty by directing one of the parties to determine the financial consequences of its decision. It is, of course, very possible that such a determination may itself become contentious, leaving the original dispute unresolved, or substituting a new dispute in its place.

10. For these reasons we allow the appeal. We are satisfied that, despite the thorough work of the FTT in addressing the numerous subsidiary issues, the decision of the FTT must be

remitted to it to complete the determination of the application by quantifying the service charges payable. There is no reason why that task should not be carried out by the same tribunal.

11. We do not underestimate the practical difficulty of quantifying the sum payable in certain cases. In this case, for example, the FTT stated that the necessary information had not been made available by the Housing Association during the hearing. Nevertheless, the FTT has adequate case management powers under rule 6 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 to direct at any time that a party should provide the information necessary to enable the tribunal to determine the amount of the service charge payable. Where the necessary information is not available at the hearing, or where it is not reasonable to expect the FTT to devote its own limited resources to the task of calculating what may be a large number of individual figures, the appropriate course is likely to be to direct the landlord or management company to recalculate the service charge in light of the tribunal's decision and then to submit it to the leaseholder for agreement, giving both parties the right to apply to the tribunal if agreement cannot be reached. In all cases, however, the final responsibility for determining the sum payable lies with the FTT.

Mr Jarowicki's appeal

12. This is an appeal against a decision of the FTT dated 15 December 2015 on an application under section 27A of the 1985 Act for a determination of the liability of the appellant, Mr Witalij Jarowicki, to pay service charges and the amount of those charges in respect of Flat 3, 38 Spring Road, Birmingham B11 3FQ for the years 2011-12 to 2015-16. The respondent to the appeal is Freehold Managers (Nominees) Limited to whom Mr Jarowicki is liable to pay service charge under the terms of his lease.

13. Once again the sole issue for which permission to appeal was granted by the Tribunal on 18 April 2006 concerned the FTT's omission to specify in terms the amount which was payable by the appellant as a service charge for each of the five years in dispute.

14. In its decision the FTT did not state in terms the amounts that were payable by the appellant as a service charge in respect of the five disputed years. In a section of its decision headed "The Tribunal's Determination" it found that the appellant was liable under his lease to "pay a proportion" of the service costs. The FTT proceeded to consider the disputed items in seven short sub-paragraphs but in no case did the tribunal state a figure for the amount of service charge payable by the appellant. For example, in addressing the amount spent on changing light fittings and replacing door locks, the FTT determined that two invoices it had examined were excessive and that "only 50% of the appropriate proportion of the cost of these invoices should be applied to the Applicant's service charge account." It did not quantify this amount.

15. In opposing the appeal the respondent has pointed out that the service charge demands and the service charge accounts were before the FTT and that both parties were aware of the annual service charge costs that had been incurred. It suggests that the FTT's omission to specify figures should be corrected under the slip rule contained in rule 50 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013. It submits that the appeal

should be refused as it was sufficiently clear to the parties which sums were determined by the FTT to be reasonable.

16. We do not agree either that the FTT's decision was an adequate determination of the issue submitted to it or that the decision is capable of being corrected in the manner suggested by the respondent.

17. The appellant's complaint in his application for permission to appeal was that 'I cannot calculate the true expenses, because all these invoices are confusing'. The FTT itself referred in paragraph 18 to its task having been made difficult by the duplication of invoices and the use of invoices for different developments. When the respondent provided a copy of the documents used at the FTT hearing for the purpose of this appeal it asked for permission to supplement them with a complete set of service charge demands for the period in dispute. In circumstances where the potential for confusion and uncertainty was so great, it was incumbent on the FTT to make clear the answer to the statutory question posed by section 27A(1)(c) by determining the amounts payable as service charges. It should have stated those amounts as absolute figures rather than as percentages or proportions of unspecified sums which it left to the parties to interpret. Its omission to do so is was a breach of its duty to record its decision clearly and to provide proper reasons. If it was unable to do so on the basis of the information provided (which we think likely) it should have followed the course suggested in paragraph 11 above.

18. Nor do we accept that the omission of the FTT to state the amount of the service charges payable is a matter which could have been dealt with under the slip rule. That failure was not a clerical mistake or an accidental slip or omission. It was fundamental to the statutory question which the FTT was required to determine. For that reason we allow the appeal.

19. In this case we consider it appropriate not simply to remit the decision to the FTT for further consideration, but to set it aside and require that the application be re-determined. It is apparent from the tribunal's inability to specify figures, from the appellant's application for permission to appeal and from the request of the respondent to provide further documents that the material presented to the FTT was incomplete and confusing. At the joint request of the parties the FTT made its decision on the basis of their written representations alone, without either party or the tribunal having the opportunity to seek or provide clarification of disputed facts. Many of Mr Jarowicki's complaints concerned the quality of services provided and his evidence consisted of his own first hand observations supported in some cases by photographs. The FTT did not explain why it did not accept that evidence and it is difficult to see how it could evaluate it without hearing from the parties in person. In all of these circumstances we consider that the parties should be given the opportunity to present their cases in full, before either the same or a differently constituted tribunal.

Martin Rodger QC
Deputy Chamber President

A J Trott FRICS
Upper Tribunal (Lands Chamber)

12 October 2016